IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EVARISTO ROSARIO	:	
	:	**CIVIL ACTION**
v.	:	**NO. 96-8452**
	:	**(Crim. No. 90-201-1)**
UNITED STATES OF AMERICA	:	

MEMORANDUM ORDER

Presently before the court is the petitioner's Petitioner to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255.

Petitioner pled guilty to two of 67 counts in an indictment charging him with conspiracy to distribute cocaine and operating a continuing criminal enterprise consisting of a highly organized network of subordinates through which hundreds of kilograms of cocaine were distributed in Philadelphia. Petitioner faced 360 months to life imprisonment. The court granted the government's § 5K1.1 departure motion and sentenced petitioner to the statutory mandatory minimum of 240 months imprisonment. See 21 U.S.C. § 848(a).

Petitioner's first asserted ground for relief is that because of his deteriorated physical and mental condition, his sentence now amounts to cruel and unusual punishment.

Petitioner was injured in prison prior to sentencing when he was thrown off of a second story tier, apparently by a fellow inmate. Petitioner sustained brain trauma which resulted

in a muscular spasm that twisted his right foot inward. This condition is called dystonia.

Petitioner has been seen by orthopedic surgeons who recommended three courses of treatment. Two involve amputation and the third involves cutting the tendons in petitioner's lower right leg. Petitioner does not wish to pursue any of these remedies. The realization that these are his only treatment options has resulted in major depression. Petitioner has received psychiatric treatment while incarcerated.

While an inmate has a right to professional attention for serious medical needs and while the severe deterioration of an inmate's health may be a basis for seeking executive clemency, health problems do not render cruel and unusual a sentence which was constitutionally imposed. Even when the pressures and prospect of long confinement itself results in mental disorders and related effects as to a particular inmate, there is no authority that an otherwise lawful sentence becomes cruel and unusual "as to him." See Roberts v. United States, 391 F.2d 991, 992 (D.C. Cir. 1968).

Petitioner's second asserted ground for relief is that his counsel was ineffective for failing to seek a reduced or alternative sentence for petitioner's "extraordinary" physical impairment under U.S.S.G. § 5H1.4. Petitioner's counsel did ask the court to consider in determining an appropriate sentence that

petitioner suffered from dystonia and was in danger of losing part of his right leg. The court is aware of other inmates with comparable or worse conditions who are serving substantial sentences for similar criminal conduct. More importantly, even assuming petitioner has an "extraordinary" impairment, the court had no authority to grant a § 5H1.4 departure from a statutory minimum sentence. United States v. Rounsavall, 115 F.3d 561, 566 (8th Cir.), cert. denied, 118 S. Ct. 256 (1997); United States v. Goff, 6 F.3d 363, 366 (6th Cir. 1993) (court may not depart below statutory minimum sentence pursuant to § 5H1.4 even for defendant who was wheelchair bound quadriplegic). It clearly follows that petitioner's counsel was not ineffective for failing to request a departure below the minimum statutory sentence for reasons of physical impairment.

Petitioner's third asserted ground for relief is that his counsel was ineffective for failing to argue that petitioner's good character and family and community ties justified a downward departure pursuant to U.S.S.G. § 5H1.6. Petitioner specifically refers to his coaching efforts in community sports, his provision of employment for young people in his various businesses, his respect for others and his devotion to his family. While these acts and qualities may be admirable, they are not "extraordinary." See United States v. Gaskill, 991 F.2d 82, 85 (3d Cir.1993)(§ 5H1.6 restricts departures to truly

"extraordinary circumstances”). During the period in which petitioner was engaged in such admirable conduct, of course, he was also a leader of a criminal enterprise which pumped cocaine into the community and which utilized threats and violence. It also appears that five of the businesses in which petitioner employed young people were among the $1.4 million in assets seized by the government as having been purchased with drug proceeds. In any event, the court has no authority to depart below a statutory minimum sentence even for good deeds and family or community ties which are truly extraordinary. Petitioner’s counsel clearly was not ineffective for declining to seek a departure on this basis.

Petitioner next asserts that his counsel was ineffective for failing to challenge the amount of cocaine attributed to petitioner for sentencing purposes and that, in any event, Amendment 505 to the Sentencing Guidelines which imposes a lower base offense level for the amount attributed is retroactive. Petitioner contends that his counsel should have objected to the determination in the PSR that each packet of cocaine weighed three-tenths of a gram when one-tenth of a gram was then typical in Philadelphia. He contends that only a third of the 798 kilograms specified in the PSR, or 266 kilograms, thus should have been attributed to him. Petitioner notes that his base offense level would then have been 38 instead of 40.

Petitioner does not aver that he informed his counsel prior to sentencing that the "typical" packet of cocaine then sold in Philadelphia weighed one-tenth of a gram or that his counsel otherwise had reason to know this. In any event, a reduction in petitioner's base offense level would not have affected his sentence. He received the minimum prison sentence mandated by statute without regard to the number of kilograms attributable. See 21 U.S.C. § 848(a).

Ordinarily, to obtain the benefit of a retroactive Guidelines provision, one must petition the court for a modification of sentence pursuant to 18 U.S.C.. § 3582(c)(2). Nevertheless, the court will address petitioner's contention that he is entitled to a reduction in sentence based upon Amendment 505. A court may reduce a sentence previously imposed when the defendant's sentencing range is later lowered by the Sentencing Commission "if such a reduction is consistent with the applicable policy statements issued by the Sentencing Commission." See 18 U.S.C. § 3582(c)(2). The applicable policy statements are contained in U.S.S.G. § 1B1.10 which allows a sentence to be reduced when an applicable amendment to the Guidelines is listed in subsection (c). Amendment 505 is retroactive. See U.S.S.G. §§ 1B1.10(a) and (c). As such, petitioner's base offense level would be reduced to 38. The amendment, however, cannot benefit

petitioner because he received the minimum term of imprisonment mandated by statute.

Petitioner finally contends that the government was obligated to file a Rule 35 motion for reduction of petitioner's sentence in return for substantial assistance. Petitioner cooperated in a money laundering and RICO investigation of certain individuals in New Jersey and provided information which facilitated the forfeiture of an automobile dealership there. Petitioner made essentially the same substantial assistance argument in an earlier § 2255 petition. As noted by the court in addressing his prior petition, petitioner was obligated in his plea agreement to provide this information and the court's § 5K1.1 departure was based in large part upon his doing so. Petitioner has specified no further substantive assistance he provided, let alone any which the government could not in good faith have deemed other than "substantial."

ACCORDINGLY, this day of August, 1998, upon consideration of petitioner's Petitioner to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255, consistent with the foregoing, **IT IS HEREBY ORDERED** that said petition is **DENIED** and the above action is **DISMISSED**.

BY THE COURT:

JAY C. WALDMAN, J.